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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

TRUCK INSURANCE EXCHANGE et al., Plaintiffs and Respondents, v. FINANCIAL PACIFIC INSURANCE COMPANY, Defendant and Appellant.	C059015 (Super.Ct.No. 03AS00933)

Defendant Financial Pacific Insurance Company (Financial) appeals from a judgment entered in favor of plaintiffs Truck Insurance Exchange (Truck) and Mid-Century Insurance Company (Mid-Century). The judgment declares that, having issued commercial general liability policies to certain subcontractors, each naming the general contractor as an additional insured, Financial breached its duty to defend the general contractor in a construction defects lawsuit, and orders Financial to pay $185,000 as its portion of the reasonable cost of defending the lawsuit.

We conclude that Financial has failed to demonstrate error. Thus, we shall affirm the judgment.

BACKGROUND

From 1993 to 2001, Ridgepoint Development, LLC (Ridgepoint)[1] was the developer, and Planning Horizons Corporation (Planning Horizons) was the general contractor, involved in building a 124-unit condominium project in Citrus Heights. Kenneth Ford was the managing member of Ridgepoint and the responsible managing officer of Planning Horizons. During construction, Planning Horizons contracted with various subcontractors, including CLP Construction and Antelope Iron.

Between 1993 and 1994, CLP Construction was the contractor responsible for constructing the wood framing, putting up siding and stucco, and installing windows. Between 1994 and 1995, Antelope Iron installed chain-link fencing for the tennis court and constructed wood fencing and retaining walls for other portions of the project. Between 1995 and 1996, Antelope Iron installed "prefabricated steel stairs and stringers" and "steel guardrails" that were bolted to the buildings.

Planning Horizons, as the general contractor, was responsible for coordinating the work of all the subcontractors on the job. But each subcontractor was responsible for protecting its own work on the project from damage and for protecting the work of other subcontractors from damage caused by its work on the project.

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[1] Ridgepoint Condominium Joint Venture began the project and, at some point, merged into Ridgepoint.

The Underlying Lawsuit

In May 2000, the Sacramento County Ridgepoint Condominium Homeowners Association (Homeowners Association) filed a construction defects lawsuit against Ridgepoint, Ford, and 300 "Doe" defendants, including those "who performed services as general or subcontractors and/or provided equipment, materials and/or supplies for the construction of the Project."

The complaint alleged that, "[d]uring the approximate period of 1992 to [May 2000], Defendants negligently planned, designed, improved, constructed, inspected, installed, repaired and replaced the Project Elements," including "gates and fences," "framing," "stucco and stucco systems," "patios, decks, stairs," and "retaining walls and retaining wall systems," "so that those elements of the Project do not function properly; and are defective so as to create unsafe and unhealthy conditions; and have caused consequential damage to the buildings, improvements, personal property at the Project, and loss of use of property." The complaint also alleged that the Homeowners Association "is presently unaware of when all of the defective conditions alleged [in the complaint] first occurred or manifested themselves or caused physical injury to or destruction of tangible property, or the loss of use of such property, but asserts that the construction deficiencies at the Project have developed and occurred over a number of years since substantial completion of the Project, said deficiencies and resulting physical injuries being continuous and progressive."

Financial's Insurance Policies

Financial provided commercial general liability insurance to both Antelope Iron and CLP Construction. The policies obligated Financial, with certain exclusions, to indemnify "sums that the insured becomes legally obligated to pay as damages" because of "'bodily injury' or 'property damage'" caused by "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," that takes place "during the policy period," and to "defend any 'suit' seeking those damages." Antelope Iron was insured from June 30, 1994, to June 30, 1998, with Planning Horizons covered under an additional insured endorsement from June 30, 1994, to June 30, 1996. CLP Construction was insured from July 27, 1993, to July 27, 1994, with Planning Horizons covered under an additional insured endorsement during this policy period.[2]

The additional insured endorsement attached to each of these policies was identical and provided that Planning Horizons was an "additional insured" under the policy, but only with respect to (1) liability arising out of the named insured's work for the additional insured at the designated location, or (2) acts or omissions of the additional insured in connection with the supervision of the named insured's work at the designated location.

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[2] Antelope Iron's policy numbers 10537AA (covering June 30, 1994, to June 30, 1995) and 109749B (covering June 30, 1995, to June 30, 1996), and CLP Construction's policy number 102917A (covering July 27, 1993, to July 27, 1994), contained the additional insured endorsement protecting Planning Horizons as an additional insured.

The additional insured endorsement also provided for additional exclusions from coverage, including: "'Bodily injury' or 'property damage' occurring after: [¶] (a) All work on the project (other than service, maintenance, or repairs) to be performed by or on behalf of the [additional insured] at the site of the covered operations has been completed; or [¶] (b) That portion of [the named insured's work] out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project." The additional insured endorsement also excluded from coverage property damage to: "Property in the care, custody, or control of the [additional insured] or over which the [additional insured is] for any purpose exercising physical control."

Initial Tender of Defense

In May 2000, counsel for Ridgepoint and Ford sent a letter to Antelope Iron and its insurance broker, Owen Dunn Insurance Services, tendering defense of the Homeowners Association's lawsuit, and enclosing a copy of the complaint. The reference line identified Antelope Iron as the named insured and Planning Horizons as an additional insured, and specified Financial policy number 129768D as one of the policies under which the tender was made. The body of the letter stated the tender was being made "under the insurance policies identified above, and any other prior policies which have been issued to the named insured since 1991." The letter also explained that the complaint alleged certain "defects which fall within the scope of work of [Antelope Iron's] subcontract"

and "raise[d] the potential of covered property damage and personal injury arising out of the named insured [Antelope Iron's] work."

Financial responded with a letter declining the tender, stating a "careful review of the commercial general liability policy issued to Antelope Iron, Inc. revealed no additional insured endorsement naming your client as an additional insured on the Financial Pacific policy." Craig Hetland, Financial's "person most knowledgeable" about insurance matters relating to the Ridgepoint project, asserted the policy number identified in the reference line did not contain an additional insured endorsement.[3] Despite the fact that Planning Horizons was listed as an additional insured in the reference line, Financial's position was that the letter appeared to be tendering defense on behalf of Ridgepoint and Ford, not Planning Horizons, and neither Ridgepoint nor Ford was listed as an additional insured on any Financial policy. The notes of Jan Kirschner, the Financial employee who authored the tender rejection letter, indicate she reviewed all four of Antelope Iron's policies and declined the tender because Ridgepoint was not listed as an additional insured.

Subsequent Tender of Defense

In April 2002, Truck's counsel sent two letters to Financial, tendering defense of the Homeowners Association's lawsuit and

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[3] Policy number 129768D (covering June 30, 1997, to June 30, 1998) listed in the reference line did not have an additional insured endorsement. However, two other policies issued to Antelope Iron "since 1991" (10537AA covering June 30, 1994, to June 30, 1995, and 109749B covering June 30, 1995, to June 30, 1996) contained an additional insured endorsement protecting Planning Horizons as an additional insured.

enclosing a copy of the complaint, an amendment to the complaint, Planning Horizons' cross-complaint, and an amendment to the cross-complaint naming Antelope Iron and CLP Construction as cross-defendants.[4] One letter tendered defense of the lawsuit under Antelope Iron's policy covering June 30, 1995, to June 30, 1996. The other letter tendered defense under CLP Construction's policy covering July 27, 1993, to July 27, 1994. Both letters specified Planning Horizons as the additional insured named in the underlying construction defects lawsuit.

Financial declined the tender, asserting that the letters failed to include "any copy of a contract with [CLP Construction or Antelope Iron], any certificates of insurance, or additional insured endorsements."

Truck then provided copies of Planning Horizons' subcontracts with CLP Construction and Antelope Iron, certificates of insurance issued to both CLP Construction and Antelope Iron, and additional insured endorsements naming Planning Horizons as an additional insured.

In response, Financial acknowledged that Planning Horizons was indeed an additional insured under the policies, but Financial nonetheless declined the tender based on the "completed operations"

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[4] In August 2000, the original complaint was amended to name Planning Horizons as a defendant in place of "Doe 1." Planning Horizons then cross-complained against subcontractors that had worked on the project, including Antelope Iron and CLP Construction.

exclusion on the additional insured endorsement.[5] According to Financial, "It is our understanding that this claim arises out of completed work as the project was completed and units sold. . . . As the claims are for completed operations, pursuant to the Additional Insured Endorsement, coverage would be precluded under the policies."

The Present Lawsuit

In 2003, Truck and Mid-Century brought a declaratory relief action against several insurance companies, including Financial, alleging that each of the companies had insured one or more of the Ridgepoint project's subcontractors under policies that named Planning Horizons, Ford, and/or Ridgepoint as additional insureds. The complaint alleged that Truck had accepted the defense of both Ford and Planning Horizons in the underlying lawsuit, having issued certain policies of insurance to Ford, doing business as Planning Horizons, from 1987 to 1997. The complaint further alleged that Mid-Century had accepted the defense of Ford and Ridgepoint, having issued a policy of insurance to M & M Lightweight Concrete, one of the subcontractors on the Ridgepoint project, that named Ford and

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[5] The additional insured endorsement excluded from coverage "'[b]odily injury' or 'property damage' occurring after: [¶] (a) All work on the project (other than service, maintenance, or repairs) to be performed by or on behalf of the [additional insured] at the site of the covered operations has been completed; or [¶] (b) That portion of [the named insured's work] out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project."

Ridgepoint as additional insureds. Plaintiffs sought a declaration that each of the defendant insurance companies was obligated to defend and indemnify Ford, Planning Horizons, and/or Ridgepoint, and further sought a declaration as to defendants' proportionate share of defense and indemnity costs.

Truck and Mid-Century expended $416,987.55 defending Ford, Ridgepoint, and Planning Horizons in the underlying lawsuit before withdrawing from the defense. Anne Power, Truck's person most knowledgeable about insurance matters relating to the Ridgepoint project, testified that Truck withdrew from the defense after determining that it did not in fact owe a duty to defend. Prior to trial on the present lawsuit, plaintiffs dismissed their claims against insurers for subcontractors whose work was not implicated in the underlying lawsuit; settled with each of the remaining insurers, except Financial; and proceeded to trial solely against Financial seeking to recover the balance.

The case was tried to the court. In order to "speed up the trial," the parties stipulated that Planning Horizons was an additional insured under the Financial policies issued to Antelope Iron and CLP Construction described above. The parties also stipulated to the fact that Antelope Iron and CLP Construction engaged in work on the Ridgepoint project during the applicable policy periods. The parties further agreed to submit to the trial court only "the relevant provisions of the policies" in question. Those provisions are described above and will be analyzed in the discussion that follows. The relevant facts adduced during the trial are as described above, with the following addition.

Stephen Angelo, plaintiffs' architectural expert, testified that, during the period that Planning Horizons was listed as an additional insured under CLP Construction's policy (July 27, 1993, to July 27, 1994), CLP Construction was the framing contractor responsible for constructing the wood framing, putting up siding and stucco, and installing windows. Part of the claimed defects asserted in the underlying lawsuit involved defective "exterior openings" and defective "exterior finish, stucco and siding." Angelo also testified that, during the period that Planning Horizons was listed as an additional insured under Antelope Iron's policies (June 30, 1994, to June 30, 1996), Antelope Iron constructed wood fencing and retaining walls for the project and installed prefabricated steel stairs and balcony guardrails that it bolted to the buildings. Part of the claimed defects asserted in the underlying lawsuit involved the stair beam attachments and balcony guardrails that were bolted into the buildings. According to Angelo, the beam attachments were "not properly flashed, which allowed for water intrusion into the wall cavity, damaging the wall cavity and the finish." Similarly, the balcony rails "were not properly sealed," causing water to enter the building through the bolt penetrations, damaging the wall and finish.[6]

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[6] Angelo testified that a similar "common problem" with the type of fence-building engaged in by Antelope Iron on the project is that, "as the fence contractor brings his fence up to the building, he typically nails his fence through the finish of the building [which creates] penetration where the nails go through, [and] allows water to get into the building."

The Trial Court's Ruling

In February 2008, the trial court issued a tentative ruling finding that the initial May 2000 tender letter "was such as to put [Financial] on notice of the contractual duty to make a further inquiry as to the nature of the claim being made and the parties involved and that there was a potential or a possibility of coverage requiring [Financial] to respond by an appropriate investigation and defense in the underlying case." Finding that Financial "did not respond by providing either an investigation or a defense following this tender letter and as a result, certain costs of defense [were] incurred by certain insurers including plaintiff[s]," and "having considered the evidence presented [at trial,] including expenses incurred in the defense of the underlying case," the trial court found "a reasonable allocation of costs in favor of [plaintiffs] and against [Financial] [to be] the sum of $185,000."

In March 2008, the court issued a statement of decision to the same effect, including the following factual findings: "1) [Ford] and Planning Horizons are insureds under the [Financial] insurance policies where additional insured endorsements were issued; [¶] 2) It is possible that property damage other than to the work product of the named insureds occurred as a result of the tort[i]ous conduct of [the] named insured[s] for these policies; [¶] 3) It is possible that the property damage occurred before all work on the project to be performed by or on behalf of . . . Planning Horizons and/or [Ford] [was] completed; [¶] 4) It is possible that property damage occurred before that portion of the

work out of which the injury or damage arises has been put into its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project; [¶] 5) It is possible . . . that damage to property and the property itself was outside of the care, custody and control of Planning Horizons and/or [Ford]; and [¶] 6) It is possible that the damage was to property over which Planning Horizons and/or [Ford] did not exert physical control."

Entry of judgment followed. Financial filed a timely notice of appeal.

DISCUSSION

I

Financial contends the judgment must be reversed because plaintiffs failed to establish Financial's obligation to defend Planning Horizons in the underlying construction defects litigation. We disagree.[7]

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[7] As a preliminary matter, we reject Financial's assertion that, by "failing to offer the contracts under which they sought to impose such an obligation," plaintiffs failed to establish Financial's duty to defend. As already indicated, the parties agreed to submit to the court only "the relevant provisions of the policies" in question, and further stipulated that Planning Horizons was an additional insured under these policies and that both Antelope Iron and CLP Construction, the named insureds under the relevant policies, engaged in work on the Ridgepoint project during the applicable policy periods. Having agreed at trial that the portions submitted were the relevant portions, Financial cannot now assert that plaintiffs were required to submit the entirety of the insurance contracts. Financial also notes that the relevant provisions of the contract were not entered into evidence. At oral

A

"It is by now a familiar principle that a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity." (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081; *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275.) "[T]he duty to defend arises whenever the lawsuit against the insured seeks damages on any theory that, if proved, would be covered by the policy. Thus, a defense is excused only when 'the third party complaint can *by no conceivable theory raise a single issue* which could bring it within the policy coverage.' [Citation.] It is settled that 'the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' [Citation.] Thus, an insurer may have a duty to defend even when it ultimately has *no* obligation to indemnify, either because no damages are awarded in the underlying action or because the actual judgment is for damages not covered by the policy. [Citation.] If coverage depends on an unresolved dispute over a

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argument in this court, plaintiffs stated: "There was an agreement that 12 pages be entered into evidence. Those 12 pages for whatever reason did not get into evidence. Both the parties and the court thought they were. But what's important is none of those 12 pages are disputed as to their content. . . . And there is a myriad of admission by pleadings, by conduct arguing the undisputed language in both the trial and appeal. And . . . if those 12 pages were put into evidence, nothing would change because the language was not at dispute." The record supports this assertion. In any event, we agree with plaintiffs that the 12 pages of the commercial general liability policy attached as Exhibit A to Financial's trial brief, and the additional insured endorsement attached as Exhibit B to Financial's trial brief, which Financial agreed was identical with respect to the Antelope Iron and CLP Construction policies, contain the relevant portions of the policies.

factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend. [Citation.]" (*Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1068, orig. italics; *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300; *Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030, 1036; *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 454.)

We determine whether a duty to defend existed in a given case by examining "the policy, the complaint, and *all* facts known to the insurer from any source" (*Montrose Chemical Corp. v. Superior Court*, *supra*, 6 Cal.4th at p. 300; *Gray v. Zurich Insurance Co.*, *supra*, 65 Cal.2d at pp. 276-277), including those facts the insurer "might have ascertained had [it] diligently pursued the requisite inquiry" into the details surrounding the tender of defense (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 36-37).

"[I]n resolving whether the allegations in a complaint give rise to coverage under a [commercial general liability] policy, we must consider the occurrence language in the policy, as well as the endorsements, if any, that broaden coverage included in the policy terms." (*Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1351.) "The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) "If the meaning a layperson would ascribe to insurance contract language

is not ambiguous, then the courts will apply it regardless whether legally trained observers would perceive the language as raising doubts as to coverage due to sophisticated legal distinctions. In other words, whatever ambiguity may attach to contract language due to a party's legal knowledge is resolved in favor of coverage." (*Pardee Construction Co. v. Insurance Co. of the West*, *supra*, 77 Cal.App.4th at p. 1352.)

B

Financial provided commercial general liability policies to both Antelope Iron and CLP Construction obligating Financial, with certain exclusions not relevant to the issues raised on appeal, to indemnify "sums that the insured becomes legally obligated to pay as damages" because of "'bodily injury' or 'property damage'" caused by an "'occurrence'" that takes place "during the policy period," and to "defend any 'suit' seeking those damages." The policies defined "'occurrence'" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The additional insured endorsement attached to each of the policies provided that Planning Horizons was an "additional insured" under the policy, but only with respect to (1) liability arising out of the named insured's work for the additional insured at the designated location, or (2) acts or omissions of the additional insured in connection with the supervision of the named insured's work at the designated location. This endorsement also provided for additional exclusions from coverage, including: "'Bodily injury' or 'property damage' occurring after: [¶] (a) All

work on the project (other than service, maintenance, or repairs) to be performed by or on behalf of the [additional insured] at the site of the covered operations has been completed; or [¶] (b) That portion of [the named insured's work] out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project." The additional insured endorsement also excluded from coverage property damage to: "Property in the care, custody, or control of the [additional insured] or over which the [additional insured is] for any purpose exercising physical control."

These provisions unambiguously obligated Financial to provide a defense to Planning Horizons as an additional insured under the Antelope Iron and CLP Construction policies if the underlying construction defects lawsuit sought to recover for property damage, other than to the work product of Antelope Iron or CLP Construction, that was caused by Antelope Iron's or CLP Construction's work for Planning Horizons on the Ridgepoint project, and as long as it was possible that such property damage occurred during the applicable policy periods and before all work on the project (other than service, maintenance, or repairs) had been completed, and as long as it was possible that the damaged property was not under the care, custody, or control of Planning Horizons at the time it was damaged.

C

The trial court concluded that the underlying complaint sought to recover for such damage and that the May 2000 tender letter

"was such as to put [Financial] on notice of the contractual duty to make a further inquiry as to the nature of the claim being made and the parties involved and that there was a potential or a possibility of coverage requiring [Financial] to respond by an appropriate investigation and defense in the underlying case." Substantial evidence supports this conclusion.

The complaint alleged that from 1992 to 2000, defendants "negligently planned, designed, improved, constructed, inspected, installed, repaired and replaced" portions of the Ridgepoint project, including "gates and fences," "framing," "stucco and stucco systems," "patios, decks, stairs," and "retaining walls and retaining wall systems", and that those defective portions of the project "have caused consequential damage to the buildings, improvements, personal property at the Project, and loss of use of property." The complaint also alleged that these "defective conditions" caused "destruction of tangible property."

It was stipulated that both Antelope Iron and CLP Construction worked on the Ridgepoint project during the applicable policy periods. Indeed, during that period Planning Horizons was listed as an additional insured under CLP Construction's policy (July 27, 1993, to July 27, 1994) and CLP Construction was the framing contractor, responsible for constructing the wood framing, putting up siding and stucco, and installing windows. Part of the claimed defects asserted in the complaint involved defective "exterior openings" and defective "exterior finish, stucco and siding." During the period Planning Horizons was listed as an additional insured under Antelope Iron's policies (June 30, 1994, to June 30,

1996), Antelope Iron constructed wood fencing and retaining walls for the project, and installed prefabricated steel stairs and balcony guardrails that it bolted to the buildings. Part of the claimed defects asserted in the complaint involved the stair beam attachments and balcony guardrails that were bolted into the buildings. According to Angelo's expert testimony, these beam attachments were "not properly flashed, which allowed for water intrusion into the wall cavity, damaging the wall cavity and the finish." And the balcony rails were not "properly sealed," causing water to enter the building through the bolt penetrations, damaging the wall and finish.

From this, the trial court was justified in concluding that the complaint sought to recover for property damage, other than to the work product of Antelope Iron or CLP Construction, that was caused by Antelope Iron's or CLP Construction's work for Planning Horizons on the Ridgepoint project, and that it was at least possible that such property damage occurred during the applicable policy periods and before all work on the project (other than service, maintenance, or repairs) had been completed.

Financial correctly points out that Truck did not prove such property damage did in fact occur; however, this was not Truck's burden. All that was required to trigger the duty to defend was the possibility of such damage. It was Financial's burden to prove that such damage was impossible. (See *Mirpad, LLC v. California Ins. Guarantee Assoc.*, *supra*, 132 Cal.App.4th at p. 1068.)

D

Financial asserts that it was justified in declining the initial tender of defense because the underlying complaint was "completely devoid of any allegations that the work of Antelope Iron or CLP Construction resulted in any damage at all" and, to the extent such damage was alleged, the Homeowners Association "asserted that 'the construction deficiencies at the Project had developed and occurred over a number of years *since substantial completion of the Project*, said deficiencies and resulting physical injuries being continuous and progressive.'" (Orig. italics.) We disagree.

First, as we have explained, the underlying complaint did allege property damage, other than to the work product of Antelope Iron or CLP Construction, that was caused by Antelope Iron's or CLP Construction's work for Planning Horizons on the Ridgepoint project.

Second, Financial's reliance on a single ambiguous allegation in the complaint, taken entirely out of context, cannot defeat the possibility of coverage. While the additional insured endorsements did exclude from coverage any property damage occurring after all work on the project (other than service, maintenance, or repairs) had been completed, the allegations in the complaint do not foreclose the possibility that property damage occurred before completion. Instead, the complaint alleged that, "[d]uring the approximate period of 1992 to [May 2000], Defendants negligently planned, designed, improved, constructed, inspected, installed, repaired and replaced the Project Elements," including "gates and

fences," "framing," "stucco and stucco systems," "patios, decks, stairs," and "retaining walls and retaining wall systems," "so that those elements of the Project do not function properly; and are defective so as to create unsafe and unhealthy conditions; and have caused consequential damage to the buildings, improvements, personal property at the Project, and loss of use of property."

From these allegations, Financial could have concluded it was possible that defective work performed by Antelope Iron and CLP Construction "[d]uring the approximate period of 1992 to [May 2000]" caused property damage, other than to the work product of Antelope Iron or CLP Construction, and that it was possible that such damage occurred prior to completion of the Ridgepoint project. Indeed, the language on which Financial relies in an attempt to avoid coverage under the completed operations exclusion is prefaced with the allegation that the Homeowners Association was "presently unaware" of when all of the property damage occurred. Accordingly, when read in context, the complaint asserts that, while the Homeowners Association was unaware of when all of the property damage occurred, it occurred sometime between 1992 and 2000, and has certainly occurred "since substantial completion of the Project." Simply put, this single allegation in the complaint cannot be read to assert that all property damage occurred after the Ridgepoint project was completed.

Financial's reliance on *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106 (hereafter *Gunderson*) is misplaced. There, an insurer declined to defend its insured against a lawsuit seeking declaratory relief quieting title to an easement and injunctive

relief enjoining the insured from asserting or exercising any claim to the easement. (*Id.* at p. 1110.) Affirming the trial court's grant of summary judgment in favor of the insurer, the Court of Appeal explained "[t]here were no claims of either tangible property damage or bodily injury in the complaint." (*Id.* at p. 1115.) Rejecting the insured's argument that "there was a potential for liability under the [p]olicy because [the third party claimant] *could* have made a claim for 'physical injury to or destruction of tangible property' in connection with [a] fence across a portion of the easement which [the insured] removed at the outset of the dispute," the court explained that "[a]n insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend its complaint at some future date." (*Id.* at pp. 1114-1115.)

We agree with *Gunderson* that the duty to defend is triggered by the assertion of an *actual claim* that is *potentially covered* by the policy of insurance, and *not* the theoretical possibility that the third party complaint could have been amended to assert a claim that would have been covered. However, such is not the case here, where the underlying complaint did allege property damage that potentially fell within the additional insured endorsement. Hence, the duty to defend was triggered without the need for the speculation condemned in *Gunderson*.

Monticello Ins. Co. v. Essex Ins. Co. (2008) 162 Cal.App.4th 1376 does not assist Financial's cause. In that case, Monticello Insurance Company (Monticello) sought contribution from Essex Insurance Company (Essex) for defense costs incurred to defend

Blumenfeld, the general contractor, against a construction defects lawsuit. (*Id.* at p. 1378.) Blumenfeld was an additional insured under subcontractor Dana Drywall's insurance policy with Essex. (*Ibid.*) The Court of Appeal held that Essex did not owe a duty to defend Blumenfeld because the allegations of the complaint did not reveal a possibility that the lawsuit against Blumenfeld might be covered by the Essex policy. (*Id.* at pp. 1387-1389.) While the complaint alleged "'excessive cracking'" in the interior and exterior of the property, "'premature failure of painted surfaces,'" and "'water damage to structure,'" there was no allegation that any of this damage was caused by the drywall installation. (*Id.* at p. 1387.) Thus, Essex "was not required to speculate" that such damage might be attributable to the work of Dana Drywall. (*Ibid.*) Nor was the duty to defend triggered by a defects list, which may or may not have provided the necessary link between the alleged damages and the drywall installation, "because Monticello failed to establish said document was tendered to Essex during the pendency of the underlying [litigation]." (*Id.* at p. 1388.)

Here, the complaint specifically alleged that defective portions of the Ridgepoint project, including "gates and fences," "framing," "stucco and stucco systems," "patios, decks, stairs," and "retaining walls and retaining wall systems" (portions constructed by Antelope Iron and CLP Construction) "have caused consequential damage to the buildings, improvements, personal property at the Project, and loss of use of property." There was no need to speculate as to whether the alleged property damage was caused by the work of the "framing" contractor, or the contractor

responsible for "patios, decks, [and] stairs," because the complaint alleges as much.

E

Financial further argues there was no possibility of coverage under the additional insured endorsement because the property damage alleged in the underlying complaint was to "property in the care, custody or control" of Planning Horizons, the additional insured under the applicable policies. Again, we disagree.

Ordinarily, "'care, custody or control'" provisions "limit the insured's coverage to property other than that on which the work is being performed." (*Silva & Hill Constr. Co. v. Employers Mut. Liab. Ins. Co.* (1971) 19 Cal.App.3d 914, 924 (hereafter *Silva*).) Thus, where an insured contractor responsible for the stucco work on a house negligently performed the work causing cracks in the exterior stucco of the house, such damage to the stucco was held not to be covered by the insurance policy because the stucco work was under the care, custody, or control of the insured contractor. (*Volf v. Ocean Accident & Guar. Corp.* (1958) 50 Cal.2d 373, 374-375 (hereafter *Volf*).) However, as the Court of Appeal explained in *Silva*, "'suppose in the *Volf* case the contractor had to remove the defective stucco and this could not be done without damaging the structure of the house. The injury to the house would be covered, but the loss caused by having to remove the defective stucco would not be.'" (*Silva*, *supra*, 19 Cal.App.3d at p. 925, quoting Macaulay, *Justice Traynor and the Law of Contracts* (1961) 13 Stan. L.Rev. 812, 825-826.)

Here, the complaint alleged that defective work on the framing, stucco, fences, patios, decks, stairs, and retaining walls "caused consequential damage to the buildings" at the Ridgepoint project. This is sufficient to allege at least the possibility of damage to property other than that on which the work of Antelope Iron and CLP Construction was being performed.

Nevertheless, Financial argues that Planning Horizons, the additional insured under the applicable policies, exercised control over the entire Ridgepoint project, such that any damage caused by either Antelope Iron or CLP Construction to any portion of the project was outside the scope of the additional insured endorsement. In support of this position, Financial relies on *Home Indem. Co. v. Davis* (1978) 79 Cal.App.3d 863 (hereafter *Home Indemnity*), which explained: "Almost invariably where coverage is denied [under a care, custody, or control provision], physical control by the insured has been exclusive, even if such exclusivity was only momentary, so long as the damage occurred in that moment." (*Id.* at p. 871.) There, a pugmill, part of a portable batch plant, was damaged while the plant was being dismantled with the use of a crane owned and operated by insured Davis. (*Id.* at p. 866.) Davis was held liable for the damage, and Home Indemnity Company was held to have provided coverage to Davis for such liability notwithstanding its claim that the pugmill was in Davis's care, custody or control at the time of the accident. (*Ibid.*) The exclusion was inapplicable because "Davis'[s] control of the pugmill was not exclusive at the time of the accident." (*Id.* at p. 872.) This was so because O'Hair, the construction company that had rented the

batch plant, had also rented the crane and operator to dismantle the plant; thus, "[t]he crane and its operator are best described as mere instrumentalities of O'Hair, with momentary access to the pugmill and the other parts of the batch plant in order to serve O'Hair's purposes, at O'Hair's direction, and under O'Hair's control." (*Id.* at pp. 866, 872.)

Financial asserts that Planning Horizons was like O'Hair in the *Home Indemnity* case and, therefore, "the exclusion applies to eliminate any potential coverage for the claims asserted against Planning Horizons as the project's general contractor, thus negating any duty on the part of Financial . . . to defend it under the circumstances." The argument is not persuasive. O'Hair was not the insured in the *Home Indemnity* case, so that decision did not pass on whether O'Hair's control of the pugmill was exclusive at the time of the accident such that the exclusion would have applied to preclude coverage under a policy insuring O'Hair. The decision simply held that O'Hair exercised enough control over the pugmill to render inapplicable the care, custody, or control provision in Davis's policy of insurance.

Here, substantial evidence supports the conclusion it was at least possible that Planning Horizons did not exercise exclusive control over the entire Ridgepoint project. Truck's expert, Angelo, testified that, although the general contractor "is responsible for the whole project," each subcontractor "is responsible for protecting his work while he is working on it" and is "also responsible for not damaging work completed by other trades." According to Angelo, the "[g]eneral contractor has overall

responsibility, but the sub[contractor] has to have control of their area, otherwise they cannot execute their work." This assessment was basically confirmed by Ford, the responsible managing officer of Planning Horizons, who stated: "If the work was not being done correctly or completed, [the superintendent] may go to the owner of that subcontract and ask him to complete the work, but I don't really recall controlling any employee of some subcontractor."

Simply stated, Financial did not carry its burden of proving that the care, custody, or control provision rendered coverage an impossibility. (See *Mirpad, LLC v. California Ins. Guarantee Assn.*, *supra*, 132 Cal.App.4th at p. 1068.)

II

Characterizing this action as one for contribution, Financial argues that, even if it had a duty to defend, the "unpaid fees" should have been "allocated among [Financial, Truck, and Mid-Century] fairly and equally"; thus, "[t]he judgment imposing on Financial . . . the sole obligation to defend Planning Horizons as among the three insurers [was] erroneous as a matter of law, and must be reversed."

Truck counters that Financial forfeited this issue by failing to raise it in the trial court and that, in any event, "undisputed evidence before the trial court independently confirmed [plaintiffs'] entitlement to recover [100 percent of the outstanding defense fees] under equitable subrogation principles which are altogether separate from equitable contribution and require no proof of 'common obligation.'"

Financial retorts that Truck "'may not, for the first time on appeal, change the theory of the cause of action'" from contribution to subrogation.

As we will explain, (1) Financial did not forfeit its argument that this is an action for contribution and, thus, if Financial had a duty to defend, the cost of the defense should have been allocated equally among Financial, Truck, and Mid-Century; and (2) Truck has not changed its theory on appeal -- Truck and Mid-Century sought to "recover 100% of defense costs" based on principles of equitable subrogation.

Whether Truck and Mid-Century were entitled to recover from Financial all of the defense costs because they paid an obligation for which Financial alone was responsible, or whether Truck and Mid-Century were entitled to only a proportionate share of the defense costs (as co-obligors with Financial), was before the trial court and was resolved on a subrogation theory. Regardless of the fact that plaintiffs' trial brief mistakenly labeled the lawsuit an "equitable contribution action," plaintiffs' argument in the trial court showed that (1) Truck and Mid-Century defended the underlying lawsuit until "investigation revealed [they] had no duty to defend," and that (2) they were therefore "seeking to recover 100% of defense costs," not contribution. Indeed, plaintiffs' trial brief explicitly argued elements of equitable subrogation, namely that Truck and Mid-Century did not owe a duty to defend and that their defense payments were not voluntarily made. Accordingly, the lawsuit was one for subrogation, but with Financial arguing a contribution theory, i.e., if it owed a defense duty, the duty was shared equally with Truck and Mid-Century.

As pointed out in *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279 (hereafter *Fireman's Fund*)), the legal concepts of contribution and subrogation are distinct but have often caused "confusion . . . for both courts and litigants[.]" (*Id.* at p. 1291.)

Equitable contribution "is the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution. In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others. [Citations.]" (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1293, orig. italics, fn. omitted.)

Equitable subrogation is "entirely different." (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1293.) It "'include[s] every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.' [Citations.]" (*Caito v. United California Bank* (1978) 20 Cal.3d 694, 704.) "The aim of equitable subrogation is to place the burden for a loss on the party ultimately liable or responsible for it and by whom it should have been discharged, and to relieve entirely the insurer or surety who indemnified the loss and who in equity was not primarily liable therefor. [Citations.]" (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1296, italics omitted.)

The elements of an insurer's cause of action for equitable subrogation are "(a) the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (b) the claimed loss was one for which the insurer was *not* primarily liable; (c) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer

to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured." (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1292, orig. italics.)

Here, Truck and Mid-Century were not entitled to contribution because they did not allege a common defense obligation. Instead, Truck and Mid-Century claimed that they defended the underlying lawsuit only until "investigation revealed [they] had no duty to defend," and Truck and Mid-Century were "seeking to recover 100% of defense costs" from Financial. A letter from Truck's coverage counsel stated that the defense was withdrawn because the insurance policies covering "Kenneth Ford DBA: Planning Horizons" covered a different location than the Ridgepoint Project; and this was confirmed by Anne Power's testimony at trial.

Accordingly, while Truck and Financial provided coverage to the same insured, Planning Horizons, they covered very different risks. Financial protected Planning Horizons against certain risks arising from the Ridgepoint location, while Truck protected Planning Horizons against certain risks arising from a completely different location. "[W]here different insurance carriers cover different risks and liabilities with respect to the same insured, they may proceed against each other for reimbursement by subrogation rather than by contribution. As discussed, contribution is only available in cases where there are coinsurers who share the same level of obligation on the same risk." (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1298, italics omitted.)

The trial court expressly and correctly found that Financial owed a defense obligation in the underlying lawsuit. And by awarding Truck and Mid-Century $185,000 in defense costs, the court impliedly and necessarily found that Truck and Mid-Century did not owe such an obligation; therefore, principles of equitable subrogation operated to shift the entirety of the defense costs to Financial, the party ultimately liable for them.

In sum, Truck and Mid-Century were not entitled to contribution as they did not share a common defense obligation with Financial; however, this is precisely why we reject Financial's claim that defense costs "must be shared with Mid-Century and Truck, and the unpaid fees allocated among the three of them fairly and equally."

Financial fails on appeal to adequately challenge the right of Truck and Mid-Century to equitable subrogation. In its opening brief, Financial simply challenges the right of Truck and Mid-Century to contribution based on the lack of a common defense obligation. Then, in response to the argument of Truck and Mid-Century that they were entitled to subrogation, Financial asserts in its reply brief, *without citation to the record or relevant authority*, that (1) there was "no evidence whatsoever to support any assertion that [Truck and Mid-Century] did not act as volunteers," and (2) "the only evidence offered suggested that [Truck] did act as a volunteer, since it claimed that it never had any legal obligation to defend the underlying lawsuit." As the appellant, Financial has the burden of affirmatively demonstrating error, and "it is counsel's duty by argument and citation of authority to show in what respects rulings complained of are erroneous." (*Wint v. Fidelity & Casualty Co.*

(1973) 9 Cal.3d 257, 265; *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794.) Financial has failed to do so.

III

Lastly, Financial contends the damages awarded by the trial court were excessive. We disagree.

Substantial evidence supports the trial court's finding that Truck and Mid-Century paid at least $185,000 in defense costs which were not recouped through settlement with the settling insurers. And, agreeing with the trial court that the 2000 tender of defense was sufficient to trigger Financial's defense obligation, we reject Financial's assertion that it was not responsible for defense fees incurred prior to the 2002 tender of defense.

DISPOSITION

The judgment is affirmed. Financial shall reimburse Truck and Mid-Century for their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

SCOTLAND, P. J.

We concur:

BLEASE, J.

SIMS, J.